

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

In the Matter of)	
)	
Bloomberg L.P.,)	
)	
Complainant,)	MB Docket No. 11-104
)	
v.)	
)	
Comcast Cable Communications, LLC,)	
)	
Defendant.)	

To: Chief, Media Bureau

**REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE
SURREPLY OF COMCAST CABLE COMMUNICATIONS, LLC**

1. Comcast respectfully submits this Reply in further support of its Motion for Leave to File Surreply. As explained in the Motion, Comcast’s Surreply is warranted both to ensure a complete record and to afford Comcast an opportunity to respond to Bloomberg’s new factual and legal arguments.¹ Bloomberg’s Reply was nearly *four times* the length of its Complaint, attached *seven* new expert declarations, and raised a host of legal arguments and factual assertions that Bloomberg first raised in its Reply.

¹ See, e.g., *In the Matter of Sky Angel U.S., LLC*, 25 FCC Rcd 3879, 3879 ¶ 1 n.1 (2010) (denying motion to strike and considering the substantive arguments made in additional pleading “in the interest of a complete record”); *In the Matter of Comcast of Potomac, LLC*, 24 FCC Rcd 8919, 8921 ¶ 7 (2009) (granting motion to file a surreply “because, although the surreply does repeat some previously made points, it also illuminates several specific points in response to matters raised for the first time in the Reply”); *In the Matter of the Establishment of Policies and Serv. Rules for the Mobile Satellite Serv. in the 2 GHz Band*, 14 FCC Rcd 4843, 4847–48 ¶ 5 n.19 (1999) (granting motion for surreply and associated responses to ensure a complete record).

2. *First*, Bloomberg unsuccessfully attempts to reconcile the approach to defining a news “neighborhood” set forth in its Complaint with the entirely new and different approach introduced for the first time in its Reply. But the two approaches are distinct and incompatible. Under the approach set forth in the Complaint, any four-channel grouping constitutes a news “neighborhood” because any such grouping was “probably caused by something other than mere chance.”² Under the approach introduced in the Reply, by contrast, the definition of a news “neighborhood” is determined by “qualitative” factors other than the number and percentage of news channels that it contains. Under this novel approach, a grouping of only “two or three” channels may constitute a neighborhood, even if “many more” channels can be found elsewhere.³

3. *Second*, Bloomberg argued in its Reply that four-channel groupings are and have long been commonplace throughout the cable industry and that this fact somehow supported its position that four-channel groupings constitute news “neighborhoods.”⁴ The Surreply appropriately responded that this new line of argument offended the doctrine of judicial estoppel, while disconnecting the Condition from any Transaction-related harm.⁵ The Opposition makes no effort to demonstrate that Bloomberg introduced this line of argument in its Complaint.⁶

² Surreply ¶ 5.

³ *Id.* ¶ 8 (quoting Reply Ex. F (Arnold Decl.) ¶ 20).

⁴ Reply at 33–36.

⁵ Surreply ¶ 3.

⁶ Notably, Bloomberg admits that its argument that a condition pertaining to news “neighborhoods” would be Transaction-specific hinged on its assertion that, “[a]bsent the transaction, . . . *given trends within the industry*, Comcast would begin to move BTV to be near CNBC . . . on its channel lineups.” Opp’n at 15 (emphasis added). The only industry “trend” identified on the Transaction record was the “trend” (exemplified by Time Warner’s 14-channel groupings and Comcast’s MCLU trial) toward creating broad channel groupings above channel

4. *Third*, the Opposition fails to explain how Comcast, in its Answer, could have anticipated theories that Bloomberg and its experts proffered in Reply to justify the exclusion of various news channels from their analyses. Bloomberg’s Complaint and Professor Crawford’s initial declaration arbitrarily excluded dozens of news networks without any explanation.⁷ Bloomberg’s Reply and attached expert declarations belatedly attempt to provide various explanations for these exclusions. The Surreply was Comcast’s first opportunity to respond to these explanations. Conceding as much, Bloomberg devotes six pages of its Opposition to arguments that Bloomberg should have presented in prior filings.⁸

100. There was and is no evidence, either on the Transaction record or on the record of this proceeding, of a “trend” among cable operators toward relocating BTV and other independent news channels to legacy channel groupings in the 1–99 range. If the Condition were recast as Bloomberg now proposes, the Condition would not “requir[e] Comcast to do what it likely would have done absent its merger with NBCU,” Opp’n at 15, but require Comcast to reorder its channel lineups in a way that no cable operator has done.

⁷ See Compl. Ex. F (Crawford Decl.) ¶ 14.

⁸ See Opp’n at 6–11. Current TV, WORLD multicasts, weather-focused news channels, and PEG channels together account for 80% of the difference between Mr. Egan’s and Bloomberg’s estimates of the average number of news channels per Comcast headend. See Surreply Ex. 1 (Egan Supp. Decl.) ¶ 53. Bloomberg does not dispute that the majority of programming carried by Current TV and WORLD multicasts is news programming, and concedes that The Weather Channel is a news channel. See Opp’n at 6, 11. Bloomberg contends that other weather-focused news channels and PEG channels are not news because they provide insufficient levels of “reporting and analysis,” *id.* at 6 n.3 & 11, but this theory—under which programs that broadcast legislative debates or track approaching hurricanes would not be considered news—is at odds with industry practice and Bloomberg’s admission that C-SPAN is a news network. See Surreply ¶¶ 27–29. Moreover, Bloomberg’s theory would require the Bureau to draw fine, content-based distinctions, raising serious First Amendment concerns. See *id.* ¶ 32 & n.63.

Bloomberg also speculates that the cable industry executives who assisted Mr. Egan in classifying news channels may have been Comcast employees. Opp’n at 9. Mr. Egan was assisted by two cable industry executives whose work he personally reviewed. See Answer Ex. 4 (Egan Decl.) ¶ 9. Neither of those executives—Lew Scharfberg, principal of Broadband Product Management, LLC, and formerly VP of Product Management for RCN, and Michael Rahimi, founder of MRInsights and formerly SVP of Marketing and Consumer Services for Mediacom Communications—is a current or former Comcast employee.

5. *Fourth*, the Opposition fails to explain how the Bureau would have a complete record on which to base a decision without the corrected channel-move analysis that the Surreply provides. The channel-move analysis presented (for the first time) in Bloomberg's Reply was faulty and fostered the misimpression that Comcast relocates channels in the 1–99 range frequently and as a matter of course. The Surreply corrects this by clarifying: (1) that nearly half of all Comcast headends experienced no channel relocations in the 1–99 range, (2) that 95 percent of Comcast's lineups experienced less than one channel relocation on average, and (3) that the changes made on the remaining 5 percent of headends were generally made to address engineering or alignment issues, often on systems serving relatively small numbers of subscribers.⁹ Bloomberg does not dispute that Comcast's data is necessary to complete the record.¹⁰

6. Given the sheer number of new arguments and assertions that Comcast had to address—and in particular, the data cleaning, verification, and formatting that it had to undertake—the time Comcast needed to prepare its Surreply was reasonable. Bloomberg's suggestion that the Bureau should reject Comcast's Surreply in the interest of expediting this proceeding can hardly be credited when Bloomberg itself made the tactical decision to reserve so many of its arguments, experts, and factual assertions for its Reply—and to use its Reply significantly to revise its legal theory. Further, Bloomberg is not prejudiced by acceptance of Comcast's Surreply since it has responded substantively to Comcast's Surreply in the body of its

⁹ Surreply ¶¶ 35–38.

¹⁰ Instead, the Opposition introduces *additional examples* of channel moves purportedly made on other Comcast headends. Opp'n at 18. None of these examples affects the basic conclusions of Comcast's channel-move analysis. Any further inquiry into channel moves made on individual headends would be more appropriately undertaken in connection with an evidentiary hearing before an Administrative Law Judge, rather than through ongoing written submissions.


lengthy Opposition. Comcast does not oppose acceptance of Bloomberg's substantive responses into the record.

7. Accordingly, the Bureau should deny Bloomberg's Opposition and grant Comcast's Motion for Leave to File a Surreply.

Respectfully submitted,

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October 17, 2011

VERIFICATION

I, Arthur J. Burke, do hereby declare and state under penalty of perjury as follows:

1. I am a partner in the law firm of Davis Polk & Wardwell LLP, and
2. I have read the foregoing Reply in Support of Motion for Leave to File Surreply of Comcast Cable Communications, LLC ("Reply"). To the best of my personal knowledge, information, and belief, the statements made in this Reply other than those of which official notice can be taken, are well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. This Reply is not interposed for any improper purpose.

October 17, 2011



Arthur J. Burke

CERTIFICATE OF SERVICE

I, Arthur J. Burke, hereby certify that, on October 17, 2011, I caused copies of the attached "Reply in Support of Motion for Leave to File Surreply of Comcast Cable Communications, LLC" to be served by electronic mail and first-class mail to the following:

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A handwritten signature in black ink, appearing to be 'AJB', is written over a horizontal line.

Arthur J. Burke